IN THE

# Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-1637

MARY KATHRYN GRIFFITH, Individually, and as Administratrix of the Estate of GEORGE L. GRIFFITH, Deceased,

Petitioner,

VERSUS

CANAL BARGE COMPANY, INC.,

Respondent.

## REPLY BRIEF ON BEHALF OF CANAL BARGE COMPANY, INC., RESPONDENT

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## LIST OF AUTHORITIES


Page

Al Johnson Construction Company v. The S/S RIO ORINOCO, 249 F.Supp. 182 (E.D.Pa. 1965) ..... 22

Atlee v. Northwestern Union Packing Company, 21 Wall 389, 22 L.Ed. 619 ..... 22

Chesapeake & Ohio Railway v. Kelly, 241 U.S. 485, 491, 36 S.Ct. 630, 60 L.Ed. 1117 (1916) ..... 31

Continental Ins. Co. v. Sabine Towing Co. 1117 F.2d 694 (5th Cir. 1941) ..... 15

Cooper Stevedoring Co. v. Kopke, 417 U.S. 106, 40 L.Ed.2d 694 (1974) ..... 25

Cox v. Northwest Airlines, Inc., 379 F.2d 893 (7th Cir. 1967) ..... 31

Cunningham v. Bay Drilling Co., 421 F.2d 1398 (5th Cir. 1970) ..... 35

Davis v. Hill Parke Goodloe Co., 302 F.2d 489 ..... 15

Farmer v. O.S. Fluffy, 220 F.Supp. 917 (1963) ..... 15

Complaint of Farrell Lines, Inc., 389 F.Supp., 194, 199 (S.D.Ga. 1975) ..... 28

Frankel v. Heym, 321 F.Supp. 1331, 1346 (E.D.Pa. 1970) ..... 33

Furumizo v. U.S., 245 F.Supp. 981, 1013 (D. Hawaii 1965) ..... 33

Page

Gardner v. National Bulk Carriers, 221 F.Supp., 243 (E.D.Va. 1963) ..... 29

Hoffman v. Sterling Drugs, Inc., 484 F.2d 132, 143-144 (3rd. Cir. 1974) ..... 33

Johnson v. Penrod, 510 F.2d 234, 241 (5th Cir. 1975) ..... 29, 30, 32, 34, 35, 36

Law v. Sea Drilling Corp., 510 F.2d 242 (5th Cir. 1975) ..... 30, 34

Magill v. Westinghouse Electric Co. 464 F.2d 294, 301 (3rd Cir. 1972) ..... 33

McWeeny v. New York, N.H. & H.R.R., 282 F.2d 34 (2d Cir. 1960) ..... 32

Neal v. Saga Shipping Co., 407 F.2d, 488 (5th Cir. 1969) ..... 29

Petition of Maria Mercante Nicaraguense, 248 F. Supp. 15 ..... 27

Petition of U.S. Steel, 436 F.2d 1256 (6th Cir. 1970) ..... 33

Pioneer Steamship Company v. Hill, 227 F.2d 262 ..... 15

Reinhart v. U.S., 457 F.2d 151 (9th Cir. 1972) ..... 23

Robertson v. Delta Steamship Co., 510 F.2d 829, 837 (5th Cir. 1975) ..... 35





Page

Schlichter v. Port Arthur Towing Co., 288 F.2d 801 (5th Cir. 1961) ..... 24

Sealand Services v. Gaudet, 414 U.S. 573, 39 L.Ed.2d. 9 (1975) ..... 26

Sleeman v. Chesapeake & Ohio Railway Co., 414 F.2d 305 (6th Cir. 1969) ..... 32

Sylve v. Gravolet Canning Co., 78 F. Supp. 669 (E.D. La. 1967) ..... 15

The Severance, 152 F.2d 916 (4th Cir. 1959) ..... 23

Standefer v. U.S., 511 F.2d 101, 107 (5th Cir. 1975) ..... 35

United States Steel Corporation v. Lamp, 407 F.2d 1143 (6th Cir. 1969) ..... 16, 21

U.S. v. Reliable Transfer Co., Inc., 43 USLW 1177 (1975) ..... 25

Walker v. Lykes Bros. Steamship Co., 193 F.2d 772 (1951) ..... 23

Weakley v. Fischbach & Moore, Inc., 515 F.2d 1260 (5th Cir. 1975) ..... 34

Williams v. U.S., 435 F.2d 804 (1st Cir. 1970) ..... 33

Yodice v. Koninklijke v. Nederlandsche Stoom. Maat, 443 F.2d 76, 78 (2d Cir. 1971) ..... 33

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# REPLY BRIEF ON BEHALF OF CANAL BARGE COMPANY, INC., RESPONDENT

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Canal Barge Company, Inc., (hereinafter referred to as "Canal Barge" or "Canal"), respondent herein, has also filed a petition for certiorari from the decision of the Fifth Circuit Court of Appeals in this case (Docket No. 1641), and Canal Barge adopts its brief in support of the petition by reference herein.

Petitioner Griffith, (hereinafter referred to as "Griffith"), in her application for certiorari sets out in a *State-*

*ment of the Case* certain essential facts, but her brief is totally in error in many of the facts stated including incorrect transcript pages which do not support these statements. Examples of the errors are:

At brief page 11:

> "When Pilot Griffith came on watch at 11:45 a.m. . . . he the pilot had no prior experience in navigating this particular tow . . ." (T. pp. 498-504).

At brief page 11:

> "The pilot, Griffith, had never before navigated a vessel and tow southbound through St. Louis Harbor in high water" (T. p. 505).

At brief page 11:

> "George Griffith was not sufficiently familiar with the tow to navigate St. Louis Harbor under the circumstances existing . . ." (T. pp. 745-746).

At brief page 13:

> "Due to the characteristics of the tow, i.e. the eight empties and two loads, with the two loads being at the rear of the port string, it was difficult, if not impossible, for Pilot Griffith to either achieve or hold the 'point' necessary to successfully accomplish the planned maneuver. All the while, the stern of the ELAINE continued its rapid swing or 'slide' to port, toward the pier of the Veterans Bridge." (T. p. 759).

## GRIFFITH MYTHS REVIEWED

At Appendix 505 we find *no* testimony at all indicating that Pilot Griffith *had never* before navigated a vessel and



tow southbound through St. Louis Harbor in high water, (actually the opposite is true and has been proven. (App. 187, 188, 179-185, 264, 1396, 1401). Further, at Appendix 498-504, there is no reference to any discussion regarding "idiosyncrasies" of the tow, but rather a statement by Captain Stroschein that Pilot Griffith inquired of him, "What kind of drag do we have to starboard?" The Captain replied that he couldn't tell anything about the drag because he hadn't been shoving the tow full ahead.

Appendix page 759 does not reflect any testimony which supports the bold assertion of "fact", nor does it even contain an opinion which states as Griffith would have the court believe: "It was difficult, if not impossible for Pilot Griffith to either achieve or hold the point necessary to successfully accomplish the planned maneuver."

At page 745 we find *not factual* testimony, but opinion testimony by a so-called expert river pilot whose past experience included crashing his towboat into a bridge and sinking the towboat!! It is certainly not proper to refer in a *Statement of the Case* to opinion testimony of a person not even on the vessel at the time of collision.

Confusion has resulted from the incorrect and unsupported findings of fact in the District Court opinion which the Appellate Court chose to affirm improperly under the substantial error rule. This confusion is advanced here by the errors in Griffith's brief.

Canal Barge will not attempt to call this court's attention to each and every factual misstatement in Griffith's brief but will refer to the established facts of this case.

## ACTUAL FACTS

The ELAINE JONES, a modern diesel powered towboat of 4300 horsepower was well equipped with the most advanced navigational equipment available in the towing industry. (App. 468, 393). The towboat was fully certified by the United States Coast Guard and the American Bureau of Shipping. (App. 625). The courts have found that at all times the vessel's equipment was completely operational and, in fact, this was unquestioned by any of the parties during the proceedings. (App. 468). The vessel and its tow, consisting of eight empty barges and two loaded barges, departed Wood River, Illinois, southbound at approximately 9:45 a.m. on the morning of October 14, 1969.[1] The tow proceeded south through lock 27 immediately above the St. Louis Harbor. At 11:45 a.m. just prior to departing lock 27, the pilot, George Griffith, came into the pilothouse to relieve the relief-master of the vessel, Vernon Stroschein who had stood the 6-12 watch. (App. 451).

Pilot Griffith, an experienced and able river pilot, had worked in the towing industry as a pilot for almost twenty years, and was familiar with this area of the river. (App. 187, 188, 179-185, 1396, 1401). During his tenure with Canal Barge, he had worked a considerable portion of his time as pilot of the M/V JOSEPH JONES which is the sister ship of the ELAINE JONES of the same dimensions and hull design and approximately the same horsepower. (App. 333-334).

Pilot Griffith stayed at the controls of the ELAINE JONES from 11:45 a.m. until the time of the collision—

[1] The towboat is pilothouse controlled which means that the person navigating the vessel controls both the engines as well as the steering from controls in the pilothouse. At the time of this collision Pilot George Griffith was this person in control of the Elaine Jones.



12:20 p.m.—and was the only person aboard this pilothouse-controlled vessel who was controlling the steering of the entire tow during the time of emergency and collision.

Following the customary procedure employed by Canal Barge, the ELAINE JONES was engaged in the movement of barges to and from various points on the Inland Waterways System. To accomplish this, the Company has a network of towboats which meet each other on the rivers and exchange their tows. (App. 551-552). The ELAINE JONES exchanged tows with another towboat owned by Canal Barge several days before the collision. The ELAINE JONES then brought the tow to Wood River where it added two loaded barges to the tow and departed Wood River at approximately 9:45 a.m. A few days before the ELAINE JONES (with the same crew including Pilot Griffith) had proceeded north through the St. Louis Harbor on October 9, 1969. However, as the ELAINE JONES and her tow approached the St. Louis Harbor southbound on the day of the accident an extremely unusual situation was presented to them in the harbor. An unusual and drastic rise had occurred in the Mississippi River caused by an extremely unusual precipitation pattern that had occurred in the general area commencing on October 10 and continuing through October 13. The gauge in the harbor at St. Louis jumped from 3.2 feet on October 10 to 30.3 feet on October 14—a jump of 27.1 feet in the four days. The effect of this unusual rapid rise in the river was to cause the river to flow in a chaotic and abnormal fashion. However the testimony clearly reflects that the Coast Guard did not feel it necessary to close the river to traffic under the circumstances. (App. 545, 457).

The testimony of Captain Earl Daley (Canal Barge's Port Captain) must be considered at this point:

At Appendix 563:

> "There is a definite flow at the water toward the left because of the fact that the river makes a turn in this area, and the bridges are in this turn although it does not show up as much of a turn. . . .

Further, Captain Daley stated in his deposition which was introduced into evdence as Petitioner's Exhibit 16, regarding the area of the river above Veterans Bridge during high water:

> "It is not a phenomena, it is a pretty steady thing. Any time you have high water say between 20 and 30 feet, you have a left hand set above the Eads Bridge or the Veterans Bridge. *I think every pilot is fairly familiar with that. It is not a hit or miss thing, it is always there" (italics added).*

## EXPERIENCE OF PILOT GRIFFITH

The facts established reflect that Pilot Griffith was an experienced river pilot of nearly twenty years service *not* the sophomoric incompetent that Griffith would attempt to portray in her brief. Let us examine the *actual* facts:

(1) The application for employment filled out by Captain Griffith in his own handwriting and contained at appendix page 187 and 188 reflects the following information certified by Pilot Griffith on January 8, 1968, to Canal Barge:

> If master or pilot, what rivers do you run? Miss., Ill., Ohio, Cumberland, Kanawah, Missouri and Columbia —



(2) Answers to interrogatories contained in petitioner's exhibit 17b (App. 179-185) indicates that Pilot Griffith served as a pilot on the company vessels from January 7, 1968, to October 14, 1969, serving on the JOSEPH JONES, SALLY POLK and other company vessels of similar size to the ELAINE JONES. (App. 333).

(3) Pilot Griffith was serving as pilot aboard the JOSEPH JONES when the vessel and tow *went* southbound through the St. Louis harbor on *July 23* and *24*, 1969. At that time, the official engineer's gauge records introduced as exhibit A (App. 264) reflects that the river at St. Louis was at flood stage of 26.5' which is slightly less than 4' lower than it was on the day of this collision.

(4) The testimony of petitioner Griffith establishes that Pilot Griffith went to work for Sabine Towing Company in 1950 and rose within seventeen months to be a wheelhouse employee or pilot. (App. 1375). Griffith stayed with Sabin for 8 years and during that time, worked as a pilot. Later, he went with Inland Navigation Company and then returned to Sabine Towing Company prior to being employed by Chotin Transportation Company. He was employed as a pilot for Chotin for approximately 8 years. (App. 1376-1378).

(5) Petitioner Griffith indicated that during her husband's employment as a pilot on the river, she often picked him up at Memphis, St. Louis, Paducah and Baton Rouge. (App. 1395)

(6) Further, on one occasion, petitioner Griffith rode aboard a Canal Barge vessel with Pilot Griffith from Memphis to Chicago and then back to Memphis. (App. 1396)

(7) Petitioner Griffith also indicated that Pilot Griffith would telephone her from one of the locks above St. Louis and tell her to pick him up in a day or two down at Memphis below St. Louis. (App. 1401)

(8) Pilot George Griffith was hired by Canal's port captain who had been with him on several occasions when he worked as a pilot and he was satisfied with his performance and considered him to be capable. (App. 553)

(9) George Griffith served on the JOSEPH M. JONES most of the time and that vessel was almost identical with the ELAINE JONES except the ELAINE JONES had 600 more horsepower. (App. 555)

(10) From August of 1968 until October of 1969, George Griffith was the pilot of the JOSEPH M. JONES and operated the vessel between Port Sulphur, Louisiana and Joliet, Illinois which would require him to pass through the St. Louis harbor every ten days to three weeks. (App. 555-556)

(11) Pilot Griffith was considered by Canal's marine superintendent to be one of the company's better wheelhouse personnel from the standpoint of experience and ability and was considered a top pilot. (App. 365)

## CAUSE OF COLLISION

The only eye witness to the navigational maneuver that was made by the ELAINE JONES prior to the collision is found in the testimony of Captain Vernon Stroschein. His testimony is clear, unambiguous and unshaken after long and exhaustive cross-examination following one Coast Guard hearing, two discovery depositions and the trial testimony. His testimony at App. 469 was as follows:



> "Did you have an opinion as to what caused the collision with the Veterans Bridge and subsequently with the Eads Bridge?
>
> Answer: the set in the current that set us to port in the current and the oversteering on Captain Griffith's part is what caused the collision with the Veterans Bridge."

At App. 470, Captain Stroschein testified unequivocally that after the ELAINE JONES came into contact with the Veterans Bridge, that *no one* could have done anything to prevent a collision with the Eads Bridge. He described the collisions as being mere seconds apart.

The ELAINE JONES being a pilothouse controlled vessel was solely and exclusively under the control of Pilot Griffith who was at the controls in the pilothouse on the approach to the bridges and was the only person aboard the ELAINE JONES that controlled the steering of the vessel. Captain Stroschein testified at App. 467 that Pilot Griffith knew of the unusual rain that had occurred and that the river in the St. Louis Harbor had risen almost fifteen feet in one night. And then he testified as follows:

> "Q. Do you know whether or not Mr. Griffith knew of the weather conditions in the St. Louis Harbor?
>
> A. Yes, Sir, he knew.
>
> Q. How do you know that?
>
> A. It was — we had talked about the water rising so fast."

At App. 459 he testified:

A. Everything was going in a normal manner; he was shaped up as he should be.

Q. When did you first become alarmed that there was any possibility of danger?

A. When the tow was almost through the Veterans Bridge, and we were still swinging at the left-hand pier of the Veterans Bridge.

Q. And in relation to the pier of the Veterans Bridge, how far was the tow of the ELAINE JONES at that point?

A. How far about it?

Q. How far above it, below it, or wherever it was, what was the distance if you can estimate it?

A. Roughly one hundred fifty feet above the bridge.

Q. The bow of your boat was one hundred fifty feet above the Veterans Bridge; is that correct, sir?

A. Yes, sir.

Previously at App. 451, Captain Stroschein described Pilot Griffith's maneuvers before the collision and stated:

> ". . . and he steered up to the starboard to compensate for the port set, and in so doing, he oversteered and hit the left channel pier of the Veterans Bridge near the port stern of the ELAINE JONES, knocking the boat out of tow. The tow continued to set to starboard, the bow of the tow did, and the stern of the tow continued to set to port. . . . When we hit the Veterans Bridge with the stern of the boat, breaking the port side out,



> the pilot came to neutral and started reversing the engines, and at that time I left the wheelhouse and ran to the old—one level and he left shortly behind me. . . ."

This testimony is the only evidence in the record by an eye witness regarding the collision. No expert later *guessing* at what happened could furnish the Court more credible evidence than the testimony of the man actually standing in the pilothouse with the Pilot Griffith—who was at the controls.

Captain Stroschein testified that he returned to the pilothouse after having his lunch and at that time the ELAINE JONES tow was about a mile upriver from the two bridges. At that time everything looked normal to him. The first time there was any danger of a collision was when the tow was going under the Eads Bridge, and at that time the stern of the ELAINE JONES touched the Veterans Bridge. (App. 455-459). It is obvious that if Pilot Griffith was not negligent in steering the ELAINE JONES tow in the St. Louis harbor, then no one was negligent in this collision! Similarly, if he was negligent, then this negligence must mitigate petitioner's claim for recovery of damages for his death.

Petitioner's attorney asked Captain Stroschein the following question (App. 523):

"Q. Why didn't you stay in the wheelhouse and navigate this harbor as Master of the vessel? Why did you turn the boat over to your pilot with whom you had never crewed and gone casually to lunch in the face of these conditions?

A. I had full confidence in his ability.

Q. Isn't it true, Captain, that you felt him to be a superior pilot to yourself?

A. I don't know if I considered him any better pilot than I was; I knew he had more experience with that type of boat than I did. If that would have made him more qualified, then he was more qualified."

Thus, Pilot Griffith, the only party at the controls, and the only party whose steering brought the tow into collision with the two bridges was, as the result of his actions, guilty of negligence both as a matter of fact and a matter of law. It was his negligence alone that was the sole cause of the collision.

## ERRORS OF DISTRICT COURT COMPOUNDED ON APPEAL AND STILL BEING URGED BY GRIFFITH IN BRIEF

Canal Barge shows that numerous errors of fact were committed by the District Court and ignored by the Appellate Court under a mis-application of the *"Clearly Erroneous"* rule.

Glaring errors, among others, of the District Court in findings of fact are as follows:

> *"Evidence does not reveal that Griffith piloted St. Louis Harbor with high water on other occasions (App. 1440) . . . Griffith did not know of left hand set (App. 1441). Pilot Griffith misgoverned vessel (App. 1461). Pilot Griffith unfit and unequal to be a seaman (App. 1462) . . . Pilot Griffith made downbound approach too wide (App. 1435) . . . No evidence Griffith knew of conditions in the river (App. 1466)."*



The District Court's finding on these points is clearly contrary to the evidence in the record, and there is no proof that would establish a lack of knowledge on Pilot Griffith's part regarding the set in the river in the vicinity of the bridges during high water. Also, there is no proof in this record which in any way could support the trial judge's opinion that Pilot Griffith and Captain Stroschein were unfit and unequal to the calling of seamen generally. The exact opposite is true. They were both men of long experience and had never been involved in a collision. (App. 552-553)

This Court may question where the erroneous findings originated. Unfortunately, Canal Barge is unable to answer this mystery since the District Court in Greenville imposed a local unpublished rule that all Finding of Fact submitted by the litigants at the conclusion of the trial were not to be exchanged between the parties and consequently they were not subject to objection and/or correction before being adopted.

Canal Barge has shown unequivocally that the only evidence of eye witnesses remains unrebutted in the record, and also remains totally ignored by the opinion of the trial court. Over and over again, the witnesses in this case have testified that Griffith knew of the weather conditions (App. 467, 568). Further, Captain Daley in his deposition, introduced as Claimant's Exhibit 16, testified at page 18:

> "Answer: It is not a phenomenon, it is a pretty steady thing. Any time you have high water, say between 20 and 30 feet, you have a left hand set above the Eads Bridge or the Veterans Bridge. I think every pilot is fairly familiar with that. It is not a hit or miss thing, it is always there."

Moreover, the testimony is clear and unequivocal that riverpilots by use of the radios on the towboats always obtain weather conditions and weather information directly from the source, i.e. weather bureau reports, and from the locks and other boats on the river. (App. 340-342, 456-457, 628-629). George Griffith, in this case knew of the set in the river and also knew about the harbor conditions. (App. 467).

The trial court felt Captain Stroschein was guilty of negligence by abandoning the wheelhouse of the ELAINE JONES in face of danger. (App. 1461.) Yet, Captain Stroschein stated that he only left the wheelhouse after a collision was inevitable and only seconds *before* Pilot Griffith departed the wheelhouse. The facts clearly established that once the stern of the ELAINE JONES collided with the pier of the Veterans Bridge, nothing could be done by anyone in the pilothouse to avoid the collision.

How can the master be negligent for leaving the pilothouse seconds before the Pilot and the pilot *not* negligent for doing the same thing?

The tow of the ELAINE JONES on this occasion was almost substantially the same tow that had been operated by the ELAINE JONES several days prior to the collision and the pilot, Mr. Griffith, had every opportunity to get the feel of the tow previously. (App. 551-552). Moreover, the company normally exchanged tows between its towboats, and Griffith, during his many years of experience with the company, had the feel of this or similar tows on many other occasions. To support the findings that the master was negligent, the Trial Court relies upon *many* irrelevent cases *none* of which in any way support the present legal situation. In fact, every case is so totally in-



applicable to the present case, that it is amazing that they are even relied upon in the Trial Court's opinion. For instance, in *Davis v. Parkhill-Goodloe Company,* 302 F.2d 489, a 24 year old Georgia farmboy engaged in a nautical career for ten days was the one instructed rather than an experienced pilot of 18 to 20 years experience on the river. Likewise in the case of *Pioneer Steamship Company v. Hill,* 227 F.2d 262, this case involved a shipfitter's helper who fell through a hole in the deck, and had nothing to do with the pilot. In *Sylve v. Gravolet Canning Company,* 278 F.Supp. 669, (E.D. La. 1967), a crew member, described by one witness as mentally retarded, was never given instructions relative to starting a bilge pump. Yet the Trial Judge cites all of these cases to support the proposition that the master of the ELAINE JONES was negligent and failed to properly instruct an experienced and seasoned pilot about conditions of the river that the pilot already knew about and about the condition of the tow that the pilot already knew existed since he himself had piloted the tow for several days and for thirty-five minutes before the collision with the exact barge make-up present in the tow.

Again the District Court improperly cites as authority for holding that Captain Stroschein was negligent in abandoning the wheelhouse, the case of *Farmer v. O/S Fluffy D,* 220 F.Supp. 917 (1963), which involved a shrimp boat captain who jumped off of his vessel during a knife fight provoked by himself.

The District Judge, in holding the port captain of Canal Barge privy to the negligence in failing to give Grffith instructions and information relative to the weather conditions cites the case of *Continental Insurance Company v. Sabin Towing Company,* 117 F.2d 694 (5th Cir. 1941),

which is an interesting case in holding a shipowner responsible for negligence for improper repairs made aboard a vessel under the personal supervision of the officers of the company. How that case has any relevancy to the present situation is beyond Canal Barge's comprehension.

However, the case clearly applicable to the instant situation is the Sixth Circuit Court of Appeal's decision in *United States Steel Corporation v. Fuhrman*, 407 F.2d 1143 (6th Cir. 1969), wherein this exact point was discussed by the Court. The District Court found United States Steel's land office to be negligent in failing to give instructions to its master aboard a sinking vessel by radio and to intervene and countermand the master's orders when he decided to beach the vessel. In reversing, the District Court stated in its opinion as follows:

> "We are not prepared to hold, however, that company officials *sitting hundreds of miles away* had the obligation under the facts of the case to make a decision as to the best course of action to be taken and to countermand the orders of the master who was on the scene and in the middle of the emergency. . . . There was no duty for the owner to speak or otherwise interfere with the authority of the master of the vessel under these facts." (Italics added.)

## ERRORS IN APPELLATE COURT RELIED ON BY GRIFFITH

The Appellate Court opinion at Page 10 cites findings of fact relative to the negligence of Captain Stroschein which were *tendering to his pilot a tow without affording him an opportunity to get the feel of the tow . . . failing to inform the pilot of a hazard to navigation of which he*



*had knowledge . . . failing to instruct his pilot as to the proper method of navigating St. Louis Harbor . . . failing to take charge when the pilot plainly misgoverned the vessel . . . abandoning the wheelhouse in the face of danger. . . .*

The startling fact is that only Pilot Griffith and Captain Stroschein were the witnesses in the pilothouse from which any testimony in regard to the foregoing findings could have been obtained. Since Pilot Griffith was deceased, then it is only the testimony of Captain Stroschein that could support any finding of fact regarding the foregoing.

The Court indicates further that the finding of negligence based upon *failing to inform the pilot of a hazard to navigation of which he had knowledge was so obviously correct to require no comment.* No comment is made by the Court but there is no testimony to support such a broad statement. Rather, let us look at the actual testimony of Captain Stroschein at App. 467:

> "Q. Do you know whether or not Mr. Griffith knew of the weather conditions in the St. Louis Harbor?
>
> A. Yes, Sir. He knew.
>
> Q. How do you know that?
>
> A. It was—we had talked about the water rising so fast."

Furthermore, on cross-examination at App. 503 Captain Stroschein testified regarding his "feel of the tow":

> "Q. In other words, you hadn't had an opportunity to get a feel for it because of the conditions

that you had from Wood River slow through the harbor and right into the Chain of Rocks Canal, really hadn't had any experience with it yourself, had you?

A. No, Sir."

Yet the opinion affirms a finding that the Captain was negligent for having turned over the tow to the pilot knowing that a dangerous situation was 30 to 40 minutes downriver and not giving the pilot an opportunity to get the feel of the tow. The only direct testimony from Captain Stroschein is that he also had not had the feel of the tow during this intervening period of time since he was on duty and therefore it is respectfully suggested that the Court must critically look to the supposed super-expert produced by the Terminal Railroad Company who interjected this opinion testimony into the record. Also consider the fact that this so-called expert was himself a captain who had collided with a bridge *sinking* his towboat and had limited experience in the area of navigating integrated tows (App. 813, 807). This is the type of expert testimony relied upon in the District Court to condemn the actions of a Captain who never had a collision while he was at the control of any towboat.

In fact, even this expert admitted that Canal's integrated tows could be handled by pilots who would know their feel of them faster because of experience. At Appendix 816 the following was asked:

"Q. Yes, sir; in other words, if a company has certain tows that are always run together, five or ten barges together and they are exchanged by the company boats up and down the river, this is more or less the standard tow, he can get a



feel for that tow faster than someone could get where you have thirty barges one day, forty barges the next day, and various barges of all different sizes, lengths and shapes and widths, isn't that correct?

A. If a pilot has had experience with one certain type of tow at all times, he should be able to get the feel so to speak a little faster than the man that operates on different (498) sized tows and of a different type barge."

Throughout Captain Stroschein's testimony he clearly indicated that the oversteer on the part of Pilot Griffith occurred just a matter of seconds before the collision with the Veterans Bridge . . . not time for anyone to intervene!! (App. 510, 540) Further, the opinion condemns the Captain for abandoning the pilothouse in the face of danger, but the testimony is also quite clear that from the time the collision occurred with the Veterans Bridge it was inevitable that the towboat was coming into collision with the Eads Bridge, and he left seconds before Griffith. And at App. 526 Captain Stroschein was asked:

"Q. Why did you leave the wheelhouse?

A. It appeared—it look certain that collision with the Eads Bridge was coming up.

Q. It didn't enter your mind that there was something that could have been done to avoid striking the pier and the Eads Bridge?

A. Not that *I could do.*

Q. But it was your judgment you couldn't think of anything, there was nothing you could do about it?

A. Other than back the engines."

The witnesses testified that the entire maneuver to back the engines was the only thing done by Pilot Griffith because the rudders stayed in the same position that they were at the time of the collision with the Veterans Bridge and therefore a matter of two or three seconds was all that was required to change the control from full ahead to full astern and a matter of ten to twelve seconds would be all that was required for the engine revolutions to change from full ahead to full astern. (App. 525-526, 539)

The opinion also indicates that Canal has not contended that Captain Stroschein was not guilty of negligence in failing to take charge when the pilot plainly misgoverned the vessel. However, it is submitted that Canal has never acquiesced in the fact that Captain Stroschein should have intervened and taken over the wheel from Pilot Griffith. (App. 533) How can a person in a matter of seconds thrust aside a pilot from the controls of a towboat when in just a matter of a few seconds the pilot oversteers the vessel and brings the stern of the towboat into collision with the bridge when at that very instant the head of the tow is already passing under a second bridge further downriver??? (App. 510, 540) The testimony is uncontradicted and clear that once the collision occurred at the Veterans Bridge there was nothing that could have prevented a collision with the Eads Bridge. Any other assumptions or opinions are mere speculation unsupported by any thread of evidence. (App. 515, 521-526, 538)

Further, the finding of negligence on part of a Port Captain hundreds of miles away is sustained under the clearly erroneous rule but yet this finding creates a *monster of potential liability* that is unreasonable and too harsh



for shipowners to bear. The evidence is quite clear that the pilot and the master had ample opportunity to learn of the weather conditions and the existing current in the area and did obtain this information prior to the collision. (App. 338, 340-341) Their knowledge and the navigational and radio equipment made instant weather information completely available to them. Each time the tow went through a lock the weather conditions downriver were posted on the board of the locks. They further were in constant communication by radio with the other tows on the river and therefore could acquaint themselves with wind, rain and current conditions by the mere turn of a dial.

To place upon a shipowner the obligation of having a Port Captain hundreds of miles away call every vessel owned by that shipowner and state to experienced and seasoned pilots that they are coming into an area of some known hazard and they should therefore do thus and so would be to create an impossible duty. How can any supervisory employee look over the many miles and substitute his judgment for the judgment of experienced and trained experts who are operating tows on the river. . . . It is respectfully submitted that the Sixth Circuit in *United States Steel Corporation vs. Fuhrman*, supra p. 16, clearly struck down this erroneous concept and reached the correct result that shipowners do not have such a duty. The pilot at the controls is the one in control of the navigation of his vessel, and the pilot alone must control the navigation and no one on shore can tell him how to navigate against known and obvious hazards because it is only the pilot who is observing his tow's reaction to the river conditions.

## GRIFFITH BREACHED HIS DUTY OWED TO HIS EMPLOYER AND THIS CONSTITUTED NEGLIGENCE ON HIS PART

The Appellate Court correctly ruled that Pilot Griffith, the only person navigating the ELAINE JONES tow was negligent in causing this collision.

In *Atlee v. Northwestern Union Packing Company*, 21 Wall 389, 22 L.Ed. 619, the United States Supreme Court stated:

> "But the pilot of a river steamer, like a harbor pilot, is selected for his personal knowledge of the topography through which he steers his vessel. In the long course of a thousand miles in one of these rivers, he must be familiar with the appearance of the shore on each side of the river as he goes along. Banks, towns, landings, its houses and trees, and its opening between trees, are all landmarks by which he steers his vessel. The compass is of little use to him. He must know where the navigable channel is, in its relation to all of these external objects, especially in the night. He must be familiar with all dangers that are permanently located in the course of the river, as sandbars, snags, sunken rocks, or trees, or abandoned vessels or barges. All this he must know and remember and avoid . . ."

As the Court stated in *Al Johnson Construction Company v. The S.S. RIO ORINOCO*, 249 F.Supp. 182 (E.D. Pa. 1965):

> "An experienced pilot is presumed to know prevailing channel conditions and is expected to be prepared for an *emergency situation* such as severe bank suction and resulting sheer which may confront him in the course of his duties."



Further, in *The Severance*, 152 F.2d 916 (4th Cir. 1959) the Court stated:

> "We must presume here that Captain Dosher either knew or by the exercise of reasonable care should have known, of the prevailing conditions on the Cape Fear River. *By undertaking to act as pilot of the Severance, he promised the skill of his art.*" (Italics added.)

Thus, a pilot is required by law to perform his duties with a high degree of skill. His employer can expect that he will discharge his duties properly and a breach of this obligation will constitute a breach of his contract of employment.

In *Walker v. Lykes Brothers S.S. Co.*, 193 F.2d 772 (1951), Judge Learned Hand stated in his opinion:

> "The important thing in situations like that at bar is to distinguish between such a duty, which the law imposes upon the injured person, regardless of any conscious assumption of a duty toward the wrongdoer, and a duty which the injured person has consciously assumed as a term of his employment. *By contributory negligence which results in no more than reducing the amount of an employee's recovery, the Act means the first; the second is a bar to any recovery. . . .* Thus, if the plaintiff failed to repair the catches, although he was able to do so, his failure was not only contributory negligence in the first sense, but also a breach of his duty to the defendant which barred his recovery absolutely." (Italics added.)

Later, in *Reinhart v. United States*, 457 F.2d 151 (9th Cir. 1972), the Court in its opinion stated as follows:

". . . . then Circuit Judge John M. Harlan distinguished *Walker v. Lykes:* '. . . Those cases are only instances of the *firmly established rule that an employee may not recover against his employer for injuries occasioned by his own neglect of some independent duty arising out of the employer-employee relationship.* Their result turns really not upon any, question of 'proximate cause', 'assumption of risk' or 'contributory negligence' *but rather upon the employer's independent right to recover against the employee for the non-performance of a duty resulting in damage to the employer, which in effect offsets the employee's right to recover against the employer for failure to provide a safe place to work.* . . . Quite correctly and consistently with *Walker* we held that the rule of that case did not apply because there was no proof that libelant, as Third assistant Engineer, had the duty and responsibility to maintain the electrical system, including the switch box, in repair. . . ."

Griffith, an able and experienced river pilot, alone had the duty to know the river and to properly navigate the tow of the ELAINE JONES. He alone had the "*key*" to prevent the collision but he failed to use it. This he failed to do and in this regard he was guilty of the *sole* negligence in causing the accident. In a sense his actions can be equated to the deceased seaman in *Schlichter v. Port Arthur Towing Company*, 288 F.2d 801 (5th Cir. 1961) wherein the Court stated:

> "The doors had been locked by Schlichter—or one of his cohorts at his direction. Schlichter had the key. He was management's sole representative to determine when and what doors were to be locked. For what appears to have been good



> reasons — certainly plausible ones — he decided that all access doors on the main deck should be secured.
>
> Unwittingly he may have sealed his own fate in that decision. Since he alone could make these decisions, and he alone took the decisive action, neither he nor those who claim through him can assert that the vessel owner had a duty to have someone there to supervise him in the performance of the limited task which fell to his lot as the sole occupant of the tug under the permissive arrangement allowed by the owner."

This Court recently in *United States v. Reliable Transfer Co., Inc.*, 44 L.Ed.2d 251, 262 (1975) stated in its opinion:

> "We hold that when two or more parties have contributed by their fault to cause property damage in a maritime collision or stranding, liability for such damage is to be allocated among the parties proportionately to the comparative degree of their fault, and their liability for such damage is to be allocated equally only when the parties are equally at fault or when it is not possible fairly to measure the comparative degree of their fault."

While that opinion is in reference to collision liability between vessels, the same results should apply when a pilot is at fault.

Further, this Court in *Cooper Stevedoring Co. v. Kopke*, 417 U.S. 106, 40 L.Ed.2d 694 (1974) stated:

> "Indeed, it is fair to say that application of the rule of division of damages between joint tortfeasors in admiralty cases has been as broad as

> its underlying rationales. The interests of safety dictate that when two parties 'are both in fault' they should bear the damage equally to make them more careful."

Canal Barge seeks indemnity from Griffith's Estate under the doctrine enunciated in the case of *Tri-State Oil Tool Indus., Inc. v. Delta Marine Drill Company*, 410 F.2d 178 (1969) wherein the Court stated:

> "As we have already indicated, maritime law provides for tort indemnity where there is no negligence or only passive negligence attributed to the indemnitee . . . The views expressed in this opinion, therefore, require that we remand the case for a determination of whether there was active or primary negligence committed by Delta Marine (as opposed to passive, vicarious, or secondary negligence) and if so, whether such negligence was also, along with the negligence of Tri-State, a proximate cause of the accident."

Under the Maritime Law the active negligence involved in this case can only be the negligence of Griffith and any negligence on Canal Barge's part would be purely negligence of a passive nature. Under these circumstances, Canal Barge is entitled to indemnity in full from the Estate of Griffith or at least a set off for this amount.

## PETITIONER HAS FAILED TO SHOW THAT DISTRICT COURT'S ASSESSMENT OF GRIFFITH'S LIVING EXPENSES WAS CLEARLY ERRONEOUS

The Appellate Court affirmed the District Court's finding that the deceased would have consumed 25% of his earnings had he lived. This Court in *Sealand Services v.*



*Gaudet*, 414 U.S. 573, 39 L.Ed.2d 9 (1975) stated in its opinion:

> As in all damages awards for tortious injury, "[i]nsistence on mathematical precision would be illusory and the judge or juror must be allowed a fair latitude to make reasonable approximations guided by judgment and practical experience," *Whitaker v. Blidberg Rothchild Co.*, 296 F.2d 554, 555 (CA4 1961).

The problem has been summarized in the case of *Petition of Marina Mercante Nicaragues S.A.*, 248 F. Supp. 15, 27 (1965) wherein the Court stated as follows:

> "While the claimant's mathematically precise formulas have a neat surface appeal, the Court cannot accept them. They rest upon the assumption that a father's income is apportioned and distributed equally on a dollar for dollar basis among all the members of a family—parents and children—and totally disregrad the true family relationship. This attempt to determine future earnings by regarding each member of the family as a mathematical digit is quite unrealistic. There are already enough great imponderables in calculating these matters without engaging in loose reformulas. The damage determination does not lend itself to precise determination in the manner of an apothecary filling of prescriptions; at best it represents an empirical judgment based upon the evidence in each case, practical experience and common sense. The Court finds that the amounts of contribution and ensuing damages sustained by the beneficiaries of the deceased vary according to the number of children who are minors at given periods. In the instance of five children and a wife, the amount of contribution

of which they have been deprived can reasonably be fixed at 83-1/3%; four children at 80%; three or two children at 75%; one child at 66-2/3% and where the wife is the sole beneficiary, at 50%. Understandably, no particular pattern emerges from the various cases. In *Meehan v. Central Railroad*, 181 F. Supp. 594, 620, a varying allocation according to the number of minor children was applied ranging from 83-1/3% when there were five minors in the family and 50% for the wife alone. See Also *O'Connor v. United States*, 269 F.2d 578, 583 (2nd Cir. 1959) one child 66-2/3%, wife alone—50%; petitioner, *Moore-McCormack Lines, Inc.*, 184 F. Supp. 585, cert. den. 368 U.S. 989, 2 children—75%, to wife alone 50%; *Jennings v. United States*, 178 F. Supp. 516 (4th Cir. 1961) 4 children—75%, wife alone 50%."

The Trial Court apparently heard convincing and credible evidence that decedent's expenses amounted for 25% of his earnings and this finding was affirmed by the Appellate Court; accordingly, this is not a proper matter for further review by this Court since it was found to be not clearly erroneous.

In *Complaint of Farrell Lines, Inc.*, 389 F. Supp. 194, 199 (S.D.Ga. 1975), the court stated as follows:

> "In awards under the Death on the High Seas Act deductions for expenses have been made for food, clothing, pocket money, mortgage payments and cost of public utilities. See 16 A.L.R. Fed. §21 at p. 717. Under general maritime law, courts have used percentages ranging from 15% to 41-2/3%. See for example *Neal v. Saga Shipping Co.*, 407 F.2d 481, 488 (5th Cir. 1969) and *In Re Sincere Navigation*, 329 F. Supp. 652, 659 (E.D. La. 1971).



In *Neal v. Saga Shipping Co., supra*, 407 F.2d at 488, the Trial Court deducted 30% for the personal expenses of a longshoreman. The Fifth Circuit held that this presented a factual question which was not to be determined solely by precedent, however, the percentage figure thus allowed was determined to be consistent with the jurisprudence: *see*, e.g. *Gardner v. National Bulk Carriers*, 221 F. Supp. 243 (E.D.Va. 1963), *aff'd per curiam*, 333 F.2d 676 (4th Cir. 1964), in which a total deduction of 41-2/3% from decedent's gross annual earnings was allowed for living expenses of decedent, a seaman who spent the greater portion of each year away from home.

It is submitted that both lower courts were correct in their appraisal of the facts in determining that decedent's needs amounted for 25% of his earnings.

## INFLATION ISSUE WAS PROPERLY DECIDED BY APPELLATE COURT

Griffith's contention that because the Trial Court in Finding of Fact No. 21 did not characterize the two percent per year damage increment as being compensation for an inflationary trend, this increment should be allowed based upon the anticipated future increases in Griffith's income, is baseless. A trier of fact should not be permitted to take into account anticipated future increases in wages because to do so constitutes speculation and rank conjecture that defies accurate or even substantially accurate predictability. Griffith's attempt to distinguish this two percent increment as being unrelated to an inflationary trend was perhaps unknowingly anticipated by the Fifth Circuit's decision in *Johnson v. Penrod Drilling Co.*, 510 F.2d 234, 241 (5th Cir. 1975), *cert. applied for*, 43

U.S.L.W. 3684 (U.S. June 24, 1975), wherein an en banc court specifically stated that the trier of fact should not take into account future inflationary or deflationary trends in computing future lost earnings, nor should they be advised to consider such alternative descriptions of inflationary and deflationary trends as the purchasing power of the dollar or the consumer price index. The Fifth Circuit indicates that "anticipated future increases in wages" and "cost of living increases" should be disregarded as alternative descriptions of inflationary trends.

The argument advanced by Griffith on anticipated future increases in wages was also made in *Law v. Sea Drilling Corp.*, 510 F.2d 242 (5th Cir. 1975), and was accepted by the Trial Court in its findings of fact (Law argued that he could reasonably expect to increase his income based on a continued rise in income as reflected by his position and income tax returns); however, this finding was correctly reversed by the Fifth Circuit which held that such an inflationary cost of living increase in damages is not recoverable.

It is an obvious fact of life that the normal worker engaged in physical labor decreases in productivity and earnings with advancing years well prior to the termination of his work life expectancy, both as a result of decreasing financial needs and a decreasing ability to perform on a regular, full-time basis the tasks of his employment. Accordingly, Griffith's contention that the two percent per year damage increment should be allowed as a recognition of anticipated annual increases in wages should be disregarded.

In *Johnson v. Penrod Drilling Co., supra*, 510 F.2d at 241, the Fifth Circuit Court of Appeals expressly disap-



proved any attempt to take into account, in computing future lost earnings, *inflationary trends* in the nation's economy . . . since the influence on future damages of possible inflation or deflation is *too speculative* for judical determination. This decision is in harmony with the dictate of this Court in *Chesapeake & Ohio Railway v. Kelly*, 241 U.S. 485, 491, 36 S.Ct. 630, 60 L.Ed. 1117 (1916):

> "When future payments or other precuniary benefits are to be anticipated the verdict should be made up of their present value only."

It is imperative and elementary that a damage award for future losses should be reduced to its present worth because the money will be received presently and once received it is capable of earning interest into the future. See *Chesapeake & Ohio Railway v. Kelly, supra; Cox v. Northwest Airlines, Inc.*, 379 F.2d 893 (7th Cir. 1967). Obviously, this discount to present value, as required by the Supreme Court in *Kelly, supra*, would be obviated if inflation were allowed to offset the discount.

The Supreme Court's decision in *Kelly, supra*, has been reflected as the established jurisprudence in the 1936 Restatement of Torts, §924, at pages 634-635:

> "In ascertaining the present worth of the future loss of earnings, that is, in discounting the recovery because future losses are paid for in advance, the rate of discount is based upon the current return upon long-term investments if the prospective losses are long continued."

The future inflationary trend in the value of money is necessarily unknown and, consequently, always renders present damages for future loss conjectural. This Court's

mandate in *Kelly* regarding "present value" was followed in the Fifth Circuit's decision in *Johnson v. Penrod*, supra. In order to achieve reasonable certainty and to promote the efficient administration of justice, such forecasting has been eliminated and placed beyond the pale of judicial evaluation; rather, damage awards are to be based on current dollars at current discount rates. Future earnings are to be reduced to present value by use of an appropriate interest rate prevailing at the time and place of trial. *Johnson v. Penrod, supra*, 510 F.2d at 237.

The *en banc* decision in *Johnson v. Penrod*, following the dictates of this Court in *Kelly*, is supported by decisions in most other circuits. In *McWeeney v. New York, New Haven & Hartford Railroad Co.*, 282 F.2d 34, 38 (2nd Cir. 1960), *cert. denied*, 364 U.S. 870, 81 S.Ct. 115, 5 L.Ed. 2d 93 (1960), the Second Circuit commented upon the impact of inflation:

> "Though some courts have sanctioned instructions permitting the jury to take into account inflation between the injury and the trial, there is little or no authority in favor of charging the jury to take future inflation into account, see 2 Harper and James, The Law of Torts, §25.11 (1956).

Similarly, the Sixth Circuit in *Sleeman v. Chesapeake & Ohio Railway Co.*, 414 F.2d 305 (6th Cir. 1969), cited the Supreme Court decision in *Kelly* as controlling and went on to observe:

> "Nor do we encourage the trial courts of our circuit to explore such speculative influence on future damages as inflation and deflation." 414 F.2d at 308.



This position was reaffirmed by the Sixth Circuit in its decision in *Petition of U.S. Steel*, 436 F.2d 1256 (6th Cir. 1970), *cert. denied*, 402 U.S. 947, 91 S.Ct. 1649; *cert. denied*, 402 U.S. 987, 91 S.Ct. 1660; cert. denied, 402 U.S. 987, 91 S.Ct. 1665, *reh. denied*, 403 U.S. 924, 91 S.Ct. 2227; *reh. denied*, 403 U.S. 950, 91 S.Ct. 2247, involving claims arising under the general maritime law. There, the Court stated:

> "It is well settled that an award for future damages must be reduced to present value in order to take into account the earning power of that money. *Chesapeake & Ohio Ry. v. Kelly*, 241 U.S. 485, 491, 36 S.Ct. 630, 60 L.Ed. 1117 (1916). It is equally well settled in this Circuit that *the prospect of a future decline in the purchasing power of the dollar may not be used to offset the reduction to present value. Sleeman v. Chesapeake & Ohio Ry.*, 414 F.2d 305 (6th Cir. 1969)," 436 F.2d at 1280 (Emphasis added)

The legal conclusion that the present worth formula of *Kelly, supra*, was conceived and devised to prohibit inflationary considerations and that it requires the present value of money to be the proper basis for damages, is further supported by the following circuit decisions: *Williams v. United States*, 435 F.2d 804 (1th Cir. 1970); *Yodice v. Koninklijke Nederlandsche Stoom Maat*, 443 F.2d 76, 78 (2d Cir. 1971); *Magill v. Westinghouse Electric Co.*, 464 F.2d 294, 301 (3d Cir. 1972); *Frankel v. Heym*, 321 F.Supp. 1331, 1346, (E.D. Pa. 1970), *aff'd*, 466 F.2d 1226 (3d Cir. 1972); *Hoffman v. Sterling Drugs, Inc.*, 484 F.2d 132, 143-144 (3rd Cir. 1974), and discussed on remand at 374 F.Supp. 850, 852-855 (M.D. Pa. 1974); *Furumizo v. United States*, 245 F.Supp. 981, 1013 (D. Hawaii 1965); *aff'd*, 381 F.2d 965, 971 (9th Cir. 1967).

Griffith further contends that the controlling decision of *Johnson v. Penrod* is irreconcilable with other decisions to the effect that consideration may be directed to the possibility of inflation in fixing damages. The cases cited in support of this contention are easily distinguishable in that they are merely diversity of citizenship cases, which do not involve maritime or federal law, or they are decisions of the Fifth Circuit prior to *Johnson v. Penrod* and, hence, overruled by that decision as was *Law v. Sea Drilling Company, supra*. The Fifth Circuit has discussed this very problem in its recent decision of *Weakley v. Fischbach & Moore, Inc.*, 515 F.2d 1260 (5th Cir. 1975), which is a personal injury diversity suit tried under Texas law in which evidence of future inflaton was admitted on the issue of future damages under the *Erie* doctrine, and state law was held to govern the measure of damages. The *Weakley* court, 515 F.2d at 1266, 1267, then went on to state its application of the *Penrod* case as follows:

> "This Court has writ large its disapproval of calculating future damages by reference to predictions of future inflation. Johnson & Starnes v. Penrod Drilling Co., 5 Cir. 1975, 510 F.2d 234 (en banc). Numerous other federal decisions are to the same effect. See Williams v. United States, 1 Cir. 1970, 435 F.2d 804; Petition of United States Steel Corp. v. Lamp, 6 Cir. 1970, 436 F.2d 1256, cert. denied 402 U.S. 987, 91 S.Ct. 1649, 29 L.Ed.2d 153; Sleeman v. Chesapeake & Ohio Ry. Co., 6 Cir. 1969, 414 F.2d 305; McWeeney v. New York, N.H. & H. R.R., 2 Cir. 1960, 282, F.2d 34. These cases all, however, involved claims asserted on federal causes of action. Here, on the other hand, we are controlled by *Erie*. This and other federal courts have concluded that under *Erie* state law governs the measure of damages, including the admissability and jury consideration of evidence of inflation. See New Amsterdam Casualty Co. v. Soileau, 5 Cir. 1948, 167 F.2d 767, cert. denied, 335 U.S. 822, 69 S.Ct. 45, 93 L.Ed 376. Accord Magill v. Westinghouse Electric Corp., 3 Cir. 1972, 464 F.2d 294; Willmore v. Hertz, 6 Cir. 1971, 437 F.2d 357; Tullos v. Corley, 6 Cir. 1964, 337 F.2d 884. See also Rule 43(a), Fed. R. Civ. P.



The Fifth Circuit has confirmed its *Penrod* holding that an inflationary compensation award made on the ground that such an adjustment, to compensate for the effects of projected inflationary trends, is too speculative to be included as an element of damages: see *Standefer v. United States*, 511 F.2l 101, 107 (5th Cir. 1975). Further in *Robertson v. Delta Steamship Co.*, 510 F.2d 829, 837 (5th Cir. 1975), the Fifth Circuit explained that:

> "Although some confusion has existed as to the propriety of an award to compensate for inflation, that confusion has now been dissolved by this Court's recent en banc decision in Johnson v. Penrod Drilling Co., 5 Cir. 1975, 510, F.2d 234. Despite the inflationary trend now existing in this country, the court noted in *Penrod* that, 'we still cannot so surely discern the shadow of inflation as a coming event as to warrant requiring its inclusion in a present rule for calculating future damages.'"

Griffith contends that the Fifth Circuit decision in *Cunningham v. Bay Drilling Co.*, 421 F.2d 1398 (5th Cir. 1970), should be the controlling decision as to an award based on the anticipated annual increase in the cost of living, rather than *Johnson v. Penrod*. However, the *Cun-*

*ningham* decision is not a viable precedent and was merely a narrow holding that the objection to the jury charge was without merit; the jury charge itself was limited to *present* purchasing power of money. This is entirely different from the future speculative trends regarding inflation.

Griffith further contends that this question on inflation presents a "genuine controversy" which is revealed by the divided Court in *Johnson v. Penrod.* To the contrary, however, it is quite obvious that the *Johnson* court was not seriously divided since Chief Judge Brown, who dissented on the inflation issue, filed no opinion in support of his dissent.

It is submitted that future inflation cannot be considered in estimating "present awards of future dollars" as is argued by Griffith, because tort recoveries are paid in today's dollar with current purchasing power. Once a lump sum payment is made, inflation is to a large measure irrelevant because no amount will be paid in the inflated dollars. The present value of money is the only basis on which to assess lump sum damage awards that is not characterized by extreme speculation.

It is neither reasonable nor logical that inflation should have an effect on future awards for lost wages or earnings paid in a lump sum in current dollars. Consideration of inflation as an element of damages is definitely confusing and erroneous. Any inflationary trend which is generally and reasonably projected will be provided for at the market place by the rates of return on long-term investments, in the form of bonds, or by the fact that other investments, whether in property, mutual funds or stocks, will reflect in their values at a future date, the actual effect of any



inflationary, or deflationary trend encountered in the interim. Where the market so provides against inflation the Court's award of inflationary damages would constitute a duplication of the inflationary factor.

Furthermore, damages in a death action are fixed at the time of death. Examples of adherence by the court to this doctrine include the refusal in death actions to speculate on the prospect of remarriage or even to permit that fact to be revealed when it has occurred between the time of the death and the trial. Accordingly, we submit that it is infinitely more speculative and unrealistic for the court to attempt to forecast an economic future where real world facts are ignored.

In other words, if more dollars are added to the present award of damages on the ground that inflation would have increased the future earnings of the claimant which will now be lost ,it must be remembered that the additional dollars earned in the future would have smaller purchasing power because of that inflation, and yet the present judgment would be paid in current dollars with their current purchasing power. Thus, a plaintiff would get present "big" dollars to compensate him for the loss of future "little" (decreased purchasing power) dollars, and even if the computation of prophesized future inflation turned out to be exactly right, plaintiff would have received a windfall. A present judgment is paid in present dollars, not shrunken by future inflation, which can be put to immediate use in purchases and investments at the present price level.

It is significant to recognize that any reasonable form of equity investment, such as a home or rental property, will be a hedge against inflation. In other words, the award

presently received by a plaintiff may be invested so as to protect against future inflation by capital growth, as well as producing income in the meanwhile.

Furthermore, a lump sum payment of the damages presents an opportunity for a highly lucrative capital investment. The award may be immediately invested in bonds or with a Homestead Association which would yield an annual return rate of interest. Hypothetically, in the case of a deceased seaman who was earning $7,000.00 annually, a damage award of $100,000.00 to his survivors could be invested to yield a yearly rate of interest of 8% i.e. $8,000.00 per year, which would be more than the seaman had been earning. In addition, the principal would remain intact, thus providing an estate of $100,000.00 which could never have been amassed by the seaman if he had lived. This has never been the concept by which damages are awarded and should not now be allowed by the Court.

In conclusion, it is respectfully submitted that the Circuit Court was correct in relying upon the clear intent of the Supreme Court decision in *Kelly*, i.e., that future payments are to consist of their present value only; resort to the speculative inflationary trend to offset the discount to present value is and should remain prohibited.

## CONCLUSION

It is respectfully concluded that Pilot Griffith was the sole cause of the collision in this case and his actions constituted negligence on his part. Captain Stroschein and Captain Daley did not in any way contribute to the collision and they were free from fault. The opinion of the Fifth Circuit should be affirmed in holding Griffith guilty of



negligence and reversed on holding Stroschein, Daley and Canal Barge negligent.

The Fifth Circuit opinion should be affirmed on holding inflation consideration was improper, and on the personal living expense deduction for Griffith's Estate, but it should be reversed on its denial of income tax deduction from damages.

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## CERTIFICATE

I hereby certify that a copy of the above and foregoing Reply Brief has been forwarded to all counsel of record by depositing same in the U. S. mail, postage prepaid, addressed to their offices this day of September, 1975.

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Robert B. Acomb, Jr.